RECORD AND BRIEFS

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SUPREME COURT, U.S.

17-432

No. 17-__

IN THE

Supreme Court of the United States

CHINA AGRITECH, INC.,
Petitioner,

v.

MICHAEL RESH, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court held that the "timely filing of a defective class action toll[s] the limitations period *as to the individual claims* of purported class members." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (emphasis added). In this case, two defective class actions were filed during the limitations period. Respondents, absent members of the rejected classes, filed a third class action, this time outside the limitations period. The Ninth Circuit construed *American Pipe* to toll the limitations period and make this third class action timely. Respondents' class complaint would have been dismissed as untimely in at least six other Circuits, which have held—as this Court recognized in *Irwin* and other cases—that *American Pipe* applies only to individual actions, not new class actions brought by previously absent class members.

The question presented is:

Whether the *American Pipe* rule tolls statutes of limitations to permit a previously absent class member to bring a subsequent class action outside the applicable limitations period.

PARTIES TO THE PROCEEDING

Petitioner, a defendant below, is China Agritech, Inc.

The other defendants in the court below—and "respondents by rule" here—are Yu Chang, Yau-Sing Tang, Gene Michael Bennett, Xiao Rong Teng, Ming Fang Zhu, Lun Zhang Dai, Hai Lin Zhang, Charles Law, and Zheng Anne Wang. Of these individual defendants, only Charles Law has been served.

Respondents, plaintiffs below, are Michael Resh, William Schoenke, Heroca Holding, B.V., and Ninella Beheer, B.V.

RULE 29.6 DISCLOSURE

China Agritech, Inc. has no parent corporation. Carlyle Asia Growth Partners IV, L.P. and CAGP IV Co-Investment, L.P., investment funds affiliated with The Carlyle Group, collectively own more than 10% of the stock of China Agritech, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 857 F.3d 994 and reprinted in the Appendix to the Petition ("App.") at 1a–23a. The district court's opinion granting petitioner's motion to dismiss is unpublished but reported at 2014 WL 12599849 and is reprinted at App. 24a–37a. The district court's opinion denying respondents' motion for reconsideration is unpublished but reported at 2015 WL 12781246 and is reprinted at App. 38a–44a.

JURISDICTION

The court of appeals issued its decision on May 24, 2017. App. 1a. The court denied rehearing on July 3, 2017. App. 45a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1658(b) provides, in relevant part: "[A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws . . . may be brought not later than the earlier of . . . (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."

INTRODUCTION

This Court's precedents have long held that statutes of limitations are equitably tolled during the pendency of a putative class action to allow absent class members to later bring their own otherwise untimely claims. *See Am. Pipe and Constr. Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). This tolling rule protects absent class members' reliance on the class mechanism and discourages duplicative lawsuits.

For decades, the courts of appeals have uniformly rejected plaintiffs' attempts to extend *American Pipe* tolling to permit absent class members to bring not only their own claims, but also to bring claims on behalf of a class. The First, Second, Third, Fifth, Eighth, and Eleventh Circuits have held that the principles underlying *American Pipe* tolling for *individual* actions—i.e., preventing absent class members from having to file protective individual claims for fear of having them dismissed as untimely—have no application to serial *class* actions, particularly when a court had already rejected an attempt to certify a materially identical class. Tolling in those circumstances, these courts have explained, would not further any purpose recognized in *American Pipe*. Instead it would allow plaintiffs to engage in repeated attempts to certify class actions and thus undermine both the principles of *American Pipe* and the purpose of statutes of limitations.

In recent years, however, three courts of appeals—including the Ninth Circuit in the decision below—have rejected that conclusion and interpreted *American Pipe* to toll the limitations period to al-

low formerly absent class members not only to pursue their own claims but the claims of a putative class. The Ninth Circuit joined the Sixth and Seventh Circuits in adopting a rule that would extend the statute of limitations for class actions indefinitely, casting aside Congress's effort to cut off stale claims through clear time bars and inviting facially abusive litigation without any appreciable benefit to anyone other than the plaintiffs' bar.

This Court should grant certiorari to resolve the conflict among the courts of appeals over this important and recurring question. This six-to-three conflict will lead to obvious forum shopping opportunities, since the viability of an untimely class action will depend on the jurisdiction in which it was filed. After all, many nationwide class actions can be brought in any circuit, so plaintiffs seeking to lead untimely follow-on class actions will choose a circuit that permits stale class actions.

The question presented is also outcome-determinative in this case. There is no dispute that this class action is time-barred without the benefit of *American Pipe* tolling. It is the third of three materially identical class actions; the first two were timely filed but certification was denied. Respondents were absent members of the first two proposed classes and filed this putative class action outside the limitations period. It was allowed to proceed only because the Ninth Circuit held that *American Pipe* tolls the limitations period to allow previously absent class members to file new class actions. The class complaint would have been rejected as untimely had it been filed in most other circuits.

In short, this petition presents an important, recurring, and outcome-determinative question that divides the courts of appeals. And the Ninth Circuit answered that question incorrectly. Certiorari should be granted and the decision below reversed.

STATEMENT OF THE CASE

A. Relevant Legal Background

1. This is the third identical class action brought on behalf of shareholders of petitioner China Agritech, Inc. ("China Ag") alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. App. 8a. Congress has mandated that securities fraud actions like this one be brought within "2 years after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b). It is undisputed that the publicly available facts that respondents say constitute the alleged Exchange Act violations here were known and discovered more than two years before this complaint was filed. App. 9a. Thus, a straightforward application of the § 1658(b) two-year time bar would require dismissal of this action as untimely. *Id.*

2. Statutes of limitations reflect Congress's "value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Del. State Coll. v. Ricks*, 449 U.S. 250, 260 (1980). Such time bars are as a general matter strictly enforced. *See, e.g., Gabelli v. SEC*, 568 U.S. 442, 448 (2013).

This Court has also recognized, however, that statutes of limitations may be subject to equitable

tolling in "extraordinary circumstances." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 756 (2016). Relevant here is the equitable tolling rule first recognized in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974).

"[T]he source of the tolling rule applied in *American Pipe* is the judicial power to promote equity." *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017). A limitations period is tolled during the pendency of a putative class action, the *American Pipe* Court explained, to allow absent class members to bring their own individual claims. *See* 414 U.S. at 553. The specific question in *American Pipe* was whether absent class members of an uncertified class could intervene as plaintiffs in the subsequent individual suits of the named plaintiffs, even if the statute of limitations would otherwise bar the intervention. To protect absent class members' reliance on the class mechanism and discourage duplicative lawsuits, the Court held that "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.*; *see also id.* (Absent tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable.").

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), this Court extended the *American Pipe* rule to individual standalone claims. The Court reiterated that if statutory time limits for individual

claims were not tolled, the "result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. The Court therefore concluded that "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Id.* at 354. "At that point," the Court explained, "class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.*

3. This Court's precedents accordingly recognize that "plaintiff's timely filing of a defective class action toll[s] the limitations period *as to the individual claims* of purported class members." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (emphasis added). The question presented here is whether the *American Pipe* rule should be expanded to also toll statutes of limitations to allow previously absent class members to bring *class* actions outside the applicable limitations period.

B. Factual And Procedural Background

1. *Prior Class Actions*

a. The first proposed class action alleging that China Ag violated the Exchange Act was filed by Theodore Dean in February 2011. Dean wanted to represent a class of China Ag shareholders in suing China Ag and several managers and directors for allegedly violating §§ 10(b) and 20(a) of the Exchange Act, and § 11 of the Securities Act of 1933. App. 4a–6a. In October 2011, Judge Klausner—the same district judge as in this case—dismissed the Securities

Act claim on the pleadings but allowed the Exchange Act claims to proceed. App. 6a.

Dean and several newly added named plaintiffs then moved to certify a class. Respondents were not among the new named plaintiffs and did not seek to serve as lead plaintiffs or otherwise appear in the case. In March 2011, the district court denied class certification on the ground that the proposed class failed to satisfy Rule 23(b)(3)'s predominance requirement. App. 6a. Specifically, the district court concluded that the *Dean* plaintiffs had failed to satisfy the preconditions for a fraud-on-the-market theory of reliance and thus individual questions of reliance predominated over common ones. *Id.* The *Dean* plaintiffs appealed the class certification decision under Rule 23(f), and the court of appeals affirmed. *Id.*

The *Dean* plaintiffs subsequently settled their individual claims in September 2012. *Id.*

b. Approximately three weeks later, Kevin Smyth filed what the court of appeals characterized as "an almost identical class-action complaint on behalf of the same would-be class against China Agritech." App. 7a. The *Smyth* action was filed one year and eight months after plaintiffs' claims accrued. *Id.* Again, respondents did not seek to participate as named plaintiffs or appear in this action.

Although originally filed in the District of Delaware, the action was transferred to Judge Klausner. App. 7a. In August 2013, the *Smyth* plaintiffs moved for class certification, and the district court again denied the motion, this time for failure to sat-

isfy the typicality and adequate representation requirements of Rule 23(a)(3) and (a)(4). App. 7a–8a.

In January 2014, the *Smyth* plaintiffs dismissed their claims without prejudice. App. 8a.

2. *This Class Action*

It is undisputed that class members were given notice and an opportunity to intervene under the special notice requirements of the Private Securities Litigation Reform Act (the "PSLRA"). *See* 15 U.S.C. § 78u-4(a)(3). For more than three years, however, respondents chose not to get involved. Instead they waited until class certification in the *Dean* and *Smyth* actions was denied and only then sought to certify exactly the same class before the same district court that had already twice found class treatment inappropriate. App. 8a.

Respondents finally filed this case in June 2014—17 months after the applicable two-year statute of limitations had lapsed under 28 U.S.C. § 1658(b)(1). App. 8a–9a. Respondents alleged violations of Exchange Act §§ 10(b) and 20(a) "based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions." App. 8a. The case was again assigned to Judge Klausner. No other plaintiffs filed suit (either an individual or class action), sought to be appointed as lead plaintiffs, or otherwise showed an interest in this case.

3. *District Court Decision*

The district court rejected the class claims as time-barred. Relying on Ninth Circuit precedent,

the district court held that *American Pipe* tolling permitted respondents to bring their individual claims, but not another class action. The district court thus dismissed the class complaint, but permitted respondents to pursue individual actions. App. 29a–36a; *see also* App. 41a–44a.

4. *Court of Appeals Decision*

a. Respondents declined to pursue their individual claims, even though they claimed damages of nearly half a million dollars. They instead appealed, and a panel of the Ninth Circuit reversed. Departing from its own precedent, the panel held that *American Pipe* tolling permits absent class members to bring not only their own claims after the statute of limitation lapses, but also claims on behalf of absent class members—even when the district court previously found the identical class deficient. App. 22a.

The court of appeals acknowledged that an earlier Ninth Circuit panel had followed the Second Circuit in holding that "'extend[ing] tolling to class actions "tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options."'" App. 14a (quoting *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987), in turn quoting *Korwek v. Hunt*, 827 F.2d 874, 879 (2d. Cir. 1987)). But the court also construed its later *en banc* opinion in *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000), as rejecting that position. The court of appeals instead held that, in the Ninth Circuit, *American Pipe* tolls the limitations period for otherwise untimely class actions and the only limits on sequential class

actions are preclusion and comity principles. App. 15a–17a.

The court of appeals concluded that this view was consistent with three of this Court's recent cases, App. 17a–21a—two of which did not mention tolling at all, *see Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), and one of which characterized *American Pipe* tolling as applicable only to individual claims. *see Smith v. Bayer Corp.*, 564 U.S. 299, 313 n.10 (2011). The court of appeals also acknowledged *Smith*'s holding that preclusion does not apply to absent members of an uncertified class, *id.* at 315; *see* App. 18a, so preclusion principles cannot prevent perpetual class actions.

The court of appeals recognized that its rule could invite abusive litigation in the form of never-ending class actions, but identified three supposed safeguards against such abuse. First, the panel said that self-restraint by the plaintiffs' bar would serve to limit class litigation abuse. App. 22a. Second, the court held that preclusion principles would provide some barrier to serial litigation, despite acknowledging that preclusion does not apply to new class actions brought by previously absent class members (such as respondents). *Id.* Third, the panel explained that district courts could reject improper attempts to stack class actions by invoking "comity" to prior decisions denying class certification. *Id.*

b. The court of appeals denied rehearing and rehearing *en banc*. App. 46a. This petition followed.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to consider whether *American Pipe* tolling extends beyond individual actions by absent class members and allows those absent members to bring new class actions beyond the applicable limitations period. The courts of appeals are divided over that important and recurring question, and this case is an ideal vehicle through which to resolve it. And the court of appeals decided the question incorrectly.

The petition should be granted, and the decision below reversed.

A. The Courts of Appeals Are Irreconcilably Divided over Whether *American Pipe* Tolling Extends to Otherwise Untimely Class Actions.

1. *The First, Second, Fifth, and Eleventh Circuits Reject* American Pipe *Tolling for Class Actions.*

Four Circuits have definitively rejected the Ninth Circuit's position in this case that *American Pipe* tolling extends to otherwise untimely class actions, instead concluding that *American Pipe* applies only to *individual* claims of absent class members.

a. The First Circuit rejected extending *American Pipe* tolling to class actions in *Basch v. Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998). The court held that the "policies—respect for Rule 23 and considerations of judicial economy—which animated the *Crown, Cork* and *American Pipe* tolling rules dictate that the tolling rules . . . not permit plaintiffs to

stretch out limitations periods by bringing successive class actions." *Id.* at 11. "Plaintiffs may not stack one class action on top of another and continue to toll the statute of limitations indefinitely," the court explained, because "[p]ermitting such tactics would allow lawyers to file successive putative class actions with the hope of attracting more potential plaintiffs and perpetually tolling the statute of limitations as to all such potential litigants, regardless of how many times a court declines to certify the class." *Id.* "This simply cannot be what the *American Pipe* rule was intended to allow," the First Circuit concluded, "and we decline to embrace such an extension of that rule." *Id.*

b. As the court below recognized, App. 14a, the Second Circuit has also held that *American Pipe* tolling "was not intended to be applied to suspend the running of statutes of limitations for class action suits filed after a definitive determination of class certification," because "such an application of the rule would be inimical to the purposes behind statutes of limitations and the class action procedure." *Korwek*, 827 F.2d at 879.

The Second Circuit also explained that this Court's precedents "represent a careful balancing of the interests of plaintiffs, defendants, and the court system." *Id.* The case before the court fell "beyond [those] carefully crafted parameters into the range of abusive options" because the plaintiffs had "filed a complaint alleging class claims identical theoretically and temporally to those raised in a previously filed class action suit which was denied class certification." *Id.* The Second Circuit concluded that the

"Supreme Court in *American Pipe* and *Crown, Cork* certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints." *Id.*

c. The Fifth Circuit likewise rejected the rule adopted below in *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985). There the court rejected the argument that the *American Pipe* "tolling principle applies . . . not only for the first class certification petition filed but also for any subsequent petitions involving the same class." *Id.* at 1351. The court explained that there is "no authority for the[] contention that putative class members may piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Id.* "To the contrary," the court concluded, "it has repeatedly been noted that 'the tolling rule [in class actions] is a generous one, inviting abuse,' and to construe the rule as plaintiffs would have us presents just such dangers." *Id.* (quoting *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring)).

d. The Eleventh Circuit has similarly held that "Plaintiffs may not piggyback one class action onto another and thus toll the statute of limitations indefinitely." *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994) (internal quotation marks omitted). The court concluded that "the pendency of a previously filed class action does *not* toll the limitations period for additional class actions by putative members of the original asserted class." *Id.* (internal quotation marks omitted). Thus, the Eleventh Circuit agreed with the Fifth that "plaintiffs may not 'piggyback

one class action onto another,' and thereby engage in endless rounds of litigation in the district court and in this Court over the adequacy of successive named plaintiffs to serve as class representatives." *Id.* (quoting *Salazar-Calderon*, 765 F.2d at 1351).

The Eleventh Circuit has twice reaffirmed *Griffin*. *See Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324, 1328 (11th Cir. 2015); *Love v. Wal-Mart Stores, Inc.*, 865 F.3d 1322, 1323 (11th Cir. 2017) ("In the Eleventh Circuit . . . [*American Pipe*] tolling is limited to individual, not class, claims." (citing *Griffin*)).

2. *The Third and Eighth Circuits Allow Tolling for Successive Class Actions in Some Circumstances, but Not When Class Certification Was Previously Considered and Denied.*

The Third and Eighth Circuits have held that *American Pipe* tolling can apply to subsequent class actions in *some* circumstances, i.e., "where class certification has been denied solely on the basis of the lead plaintiffs' deficiencies as class representatives, and not because of the suitability of the claims for class treatment." *Yang v. Odom*, 392 F.3d 97, 111 (3d Cir. 2004); *see also Great Plains Trust Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) (following *Yang*). But "*American Pipe* tolling does not apply where certification was denied based on deficiencies in the purported class itself." *Yang*, 392 F.3d at 99; *see also In re Cmty. Bank of N. Virginia Mortg. Lending Practices Litig.*, 795 F.3d 380, 409 n.27 (3d Cir. 2015) (Under *American Pipe*, "the filing of a class action lawsuit in federal court tolls the statute of limitation for the claims of unnamed class

members until class certification is denied or when the member ceases to be part of the class, at which point the class member may intervene or file an individual suit.").

Crucial to these courts' reasoning was that "[a]llowing tolling to apply to subsequent class actions where the original class was denied because of the lead plaintiffs' deficiencies as class representatives will not lead to the piggybacking or stacking of class action suits 'indefinitely.'" *Yang*, 392 F.3d at 112. Indefinite stacking of class actions is not a worry under this rule, the Third Circuit explained, because "applying tolling under these circumstances will allow subsequent classes to pursue class claims *until a court has definitively determined that the claims are not suitable for class treatment.*" *Id.* (emphasis added). But where, as in this case, a court has already determined that class certification should be denied because of deficiencies with the putative class, *American Pipe* tolling no longer applies in the Third and Eighth Circuits.

3. *The Sixth, Seventh, and Ninth Circuits Extend* American Pipe *to Toll the Limitations Period for Otherwise Untimely Class Actions.*

The Sixth, Seventh, and Ninth Circuits construe *American Pipe* to apply to both individual and class actions and permit endless relitigation of class certification determinations.

a. The Seventh Circuit was the first court of appeals to hold that *American Pipe* tolling applies equally to individual and class actions. In *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d

560 (7th Cir. 2011), the Seventh Circuit concluded that *American Pipe* tolling applies to save late class actions and that any limitations on successive class actions have "nothing to do with tolling or *American Pipe*, and everything to do with the preclusive effect of the first decision, plus a proper application of Rule 23's criteria." *Id.* at 564. The Seventh Circuit, which decided *Sawyer* before this Court's holding in *Smith* that preclusion does not apply to class certification decisions, seems to have believed that preclusion principles would prevent previously absent plaintiffs from re-litigating a class certification denial.

b. The Sixth Circuit, following *Sawyer*, has concluded that "subsequent class actions timely filed under *American Pipe* are not barred." *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637, 652 (6th Cir. 2015). The court acknowledged that "[c]ourts may be required to decide whether a follow-on class action or particular issues raised within it are precluded by earlier litigation," but it rejected "the blanket rule advocated by Wal-Mart that *American Pipe* bars all follow-on class actions." *Id.*

The difference between *Phipps* and *Sawyer* is that *Phipps* was decided *after Smith*, so the Sixth Circuit had the benefit of this Court's holding that absent class members of uncertified classes are not subject to preclusion. *See Smith*, 564 U.S. at 313. The *Phipps* Court thus understood that preclusion rules cannot solve the problem of stacked class actions. The court in fact embraced this consequence, explaining that "the rule against non-party preclusion" necessarily "leads to relitigation of many is-

sues," but "existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of" addressing the problem of abusive stacking of class actions. 792 F.3d at 653.

c. The court of appeals below joined the Sixth and Seventh Circuits in holding that *American Pipe* tolling applies to class actions, meaning that admittedly untimely successive class actions may nevertheless go forward indefinitely—even when another court has found the exact same class unsuitable for class certification—subject only to (i) plaintiff-attorney self-restraint, (ii) admittedly inapplicable preclusion principles, and (iii) "comity." *See supra* at 10; App. 21a–22a.

The decision below demonstrates the expansive breadth of the legal rule announced in *Sawyer* and *Phipps*. While the Sixth and Seventh Circuits both generally extended *American Pipe* tolling to class actions, neither case actually applied that rule in a circumstance where certification of an identical class had already been denied. *See Sawyer*, 642 F.3d at 564–65 (class dismissed without considering whether certification was proper); *Phipps*, 792 F.3d at 648–49 (proposed new class differed in material respects from previous class in which certification was denied).

In this case, by contrast, the court of appeals *agreed* that respondents' securities-fraud claims are "based on the same facts and circumstances, *and on behalf of the same would-be class*, as in the *Dean* and *Smyth* Actions," App. 8a (emphasis added)—i.e., the two previous class actions in which the district court had denied class certification. The decision below

thus not only adopts the Sixth and Seventh Circuits' pronouncement that *American Pipe* applies to subsequent class actions, but also demonstrates the rule's extreme consequence: in these circuits, there is no limit to a plaintiff's ability to stack class actions, one after another, except for whatever weak protections the discretionary doctrine of "comity" may afford. The rule in these courts thus invites exactly the sort of endless, vexatious litigation Congress enacts statutes of limitations to prevent.

* * *

As a result of the decisional conflict just described, the viability of successive otherwise untimely class actions depends on the jurisdiction in which the plaintiff elects to file suit. Absent members of an uncertified class will be subject to strict enforcement of statutory time limits in the First, Second, Third, Fifth, Eighth, and Eleventh Circuits. But identically situated absent class members will be able to file successive class actions in the Sixth, Seventh, and Ninth Circuits without regard to statutes of limitations and subject only to whatever constraint principles of "comity" impose on district courts. That differential treatment of prospective plaintiffs and defendants, depending solely on where a suit is filed, should not be allowed to persist.

The petition for a writ of certiorari should be granted.

B. The Question Presented Is a Recurring Issue of National Importance, and This Case Presents an Ideal Vehicle for Resolving It.

1. Whether *American Pipe* tolling extends to successive class actions is a recurring question of national importance. At least nine courts of appeals have considered the question, *see supra* Section A, and district courts both within and outside those circuits continue to confront it.[1]

The effect of the conflict among the courts of appeals—and the need for national uniformity as to the question presented—is especially pronounced given the class action context. Any class action under a

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[1] *See, e.g.*, *Askins v. United States*, 113 Fed. Cl. 283, 288 (2013); *Folks v. State Farm Mut. Auto. Ins. Co.*, 281 F.R.D. 608, 614 (D. Colo. 2012); *Hershey v. ExxonMobil Oil Corp.*, 278 F.R.D. 617, 621 (D. Kan. 2011); *Dickson v. Am. Airlines, Inc.*, 685 F. Supp. 2d 623, 629–30 (N.D. Tex. 2010); *Gomez v. St. Vincent Health, Inc.*, 622 F. Supp. 2d 710, 712–14 (S.D. Ind. 2008); *Hunter v. Am. Gen. Life & Accident Ins. Co.*, 384 F. Supp. 2d 888, 891 (D.S.C. 2005); *Humes v. First Student, Inc.*, 2016 WL 5939436, at *3–6 (E.D. Cal. Oct. 11, 2016); *Barkley v. Pizza Hut of Am., Inc.*, 2015 WL 5008468, at *2 (M.D. Fl. Aug. 21, 2015); *Reaves v. Cable One, Inc.*, 2015 WL 12747944, at *4 (N.D. Ala. Mar. 16, 2015); *Lopez v. Liberty Mut. Ins. Co.*, 2015 WL 3630570, at *9 (C.D. Cal. Mar. 6, 2015); *Cleary v. Am. Capital, Ltd.*, 2014 WL 793984 at *3 (D. Mass. Feb. 28, 2014); *Love v. Wal-Mart Stores, Inc.*, 2013 WL 5434565, at *2–3 (S.D. Fla. Sept. 23, 2013); *Forde v. Waterman S.S. Corp.*, 2013 WL 5309453, at *5 (S.D.N.Y. Sept. 18, 2013); *Hull v. Wyeth*, 2012 WL 4857589, at *3 n.7 (S.D. Miss. Oct. 11, 2012); *Sheppard v. Capital One Bank*, 2007 WL 6894541, at *3 (C.D. Cal. July 11, 2007); *Vinson v. Seven Seventeen HB Phila. Corp.*, 2001 WL 1774073, at *6–7 (E.D. Pa. Oct. 31, 2001); *Lawrence v. Phillip Morris Cos.*, 1999 WL 51845, at *3 (E.D.N.Y. Jan. 9, 1999).

statute authorizing nationwide service of process can be brought in any circuit, and many other class actions can be brought in the Ninth Circuit given its expansive geographic reach. Because circuits applying *American Pipe* tolling to class actions "will attract actions in which courts in other circuits have denied class certification," *Yang*, 392 F.3d at 113–14 (Alito, J., concurring in part), the Sixth, Seventh, and Ninth Circuits will become magnets for the most abusive class actions—successive attempts to certify a class when previous certification attempts have failed. This Court's review is necessary to eradicate those forum shopping opportunities and establish uniformity as to this question of national importance.

2. This petition, moreover, provides an ideal vehicle through which to resolve the decisional conflict over the question presented. There is no dispute that, absent tolling of the statute of limitations during the pendency of the *Dean* and *Smyth* putative class actions—in which certification of the exact same class was denied—respondents' class action would be untimely under § 1658(b). App. 8a–9a. Nor is there any dispute that this action was "based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions." App. 8a.

This case thus squarely presents the purely legal question whether *American Pipe* tolling should be extended to absent class members' efforts to bring their own class actions. That question is outcome determinative here: If the Court grants certiorari and sides with the majority of courts of appeals that

have considered the question, the class claims will be rejected as time-barred. And there is no factual or jurisdictional impediment to this Court's deciding the question. The Court is unlikely to be presented with a better vehicle to resolve the circuit conflict.

C. The Decision Below Is Incorrect.

The Ninth Circuit erred in extending *American Pipe* to class actions. This Court's decisions have repeatedly "described *American Pipe* as creating a tolling rule, necessary to permit the ensuing *individual actions* to proceed." *ANZ Sec.*, 137 S. Ct. at 2054–55 (emphasis added); *see also Smith*, 564 U.S. at 313 n.10 (describing *American Pipe* as holding that "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*" (emphasis added)); *Irwin*, 498 U.S. at 96 n.3 (describing *American Pipe* as holding that "plaintiff's timely filing of a defective class action tolled the limitations period *as to the individual claims* of purported class members" (emphasis added)). These precedents begin with *Crown, Cork*, which announced a clear rule for when *American Pipe* tolling ends: "Once the statute of limitations has been tolled [under *American Pipe*], it remains tolled for all members of the putative class *until class certification is denied*." *Crown, Cork*, 462 U.S. at 354 (emphasis added). At that point, the Court explained, "class members may choose to *file their own suits* or to *intervene as plaintiffs* in the pending action." *Id.* (emphasis added).

The decision below turns that principle on its head. Under the Ninth Circuit's ruling, class mem-

bers are not limited to bringing their own suits or to intervening in the pending action, meaning the tolling period ends only when previously absent plaintiffs stop trying to certify new class actions. That rule cannot be reconciled with the principles animating *American Pipe* tolling and would lead to significant adverse policy consequences. Nothing in this Court's decisions justifies that result.

1. a. "Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Gabelli*, 568 U.S. at 448 (quoting *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)). These statutory limits "inevitably reflec[t] [Congress's] value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Ricks*, 449 U.S. at 260. Thus, enforcement of statutory time bars is "vital to the welfare of society," *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), and integral to the "evenhanded administration of the law," *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984) (per curiam).

Congress, however, is also presumed to "legislate[] against a background of common-law adjudicatory principles." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014) (internal quotation marks omitted). This background includes "[e]quitable tolling, a long-established feature of American jurisprudence derived from 'the old chancery rule.'" *Id.*

(quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). But equitable tolling applies only when "some *extraordinary circumstance* stood in [the plaintiff's] way and prevented timely filing." *Menominee Indian Tribe*, 136 S. Ct. at 755 (internal quotation marks omitted and emphasis added). Equitable tolling rules "are very limited in character, and are to be admitted with great caution; otherwise, the court would make the law instead of administering it." *Gabelli*, 568 U.S. at 454 (internal quotation marks omitted).

b. In *American Pipe* and *Crown, Cork*, this Court recognized a specific "equitable tolling" rule applicable to class actions. *See Irwin*, 498 U.S. at 96 & n.3; *ANZ Sec.*, 137 S. Ct. at 2051 (holding *American Pipe* rule is "equitable"); *Young v. United States*, 535 U.S. 43, 49 (2002) (same). Those cases held that when a class action is timely filed, the statute of limitations must be tolled as a matter of equity to allow absent class members to subsequently bring their own *individual* claims (either through new complaints or intervention in the pending action) that would otherwise be untimely. *See American Pipe*, 414 U.S. at 553; *Crown, Cork*, 462 U.S. at 354. The concern was that if the time to intervene were not tolled during the pendency of a class action, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *American Pipe*, 414 U.S. at 553. *Crown, Cork* extended this reasoning to absent class members' own individual actions, explaining that without the benefit of tolling, "class members would not be able to rely on the existence of the suit

to protect their rights," which would result in "a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." 462 U.S. at 350–51.

This policy of avoiding unnecessary prophylactic *individual* actions during the pendency of class actions does not justify permitting successive *class* actions. *American Pipe* tolling applies to individuals who relied on a class action but subsequently determined that they wish to come forward to assert their (own) rights. Tolling the limitations clock in that situation relieves absent class members of the need to file potentially unnecessary individual actions and avoids needlessly burdening the courts, all of which is consistent with the more general rule that tolling applies only when the plaintiff can establish some "extraordinary circumstance" that "prevented timely filing." *Menominee Indian Tribe*, 136 S. Ct. at 755 (internal quotation marks omitted).

By contrast, plaintiffs who want to assert rights on behalf of others can act during the pendency of the existing putative class action and do not require the special protection of equitable tolling. They can, for example, seek a leadership role in the pending class action. Indeed, this case is governed by the PSLRA, which includes a detailed mechanism for early notice to potential class members to give anyone who wants to lead the class action the opportunity to do so. *See* 15 U.S.C. § 78u-4(a)(3). There is no dispute that the PSLRA governed the two prior classes in this case, yet respondents did nothing. *See supra* at 8. Alternatively, an absent class member

can file her own representative action and then seek consolidation with any other already-filed actions, including through the federal multi-district litigation procedure. There is simply no "need" to protect absent class members' *own* rights and interests by ensuring that if certification is denied, they can still pursue an action on *others'* behalf.

c. Recognizing tolling for subsequent class actions would also result in adverse policy consequences that do not arise when tolling is limited to individual actions.

Most obviously, as then-Judge Alito recognized, the tolling rule the Ninth Circuit adopted below "could extend the statute of limitations almost indefinitely." *Yang*, 392 F.3d at 113 (Alito, J., concurring in part). The court of appeals' perpetual tolling rule, in other words, "would allow a purported class almost limitless bites at the apple as it continuously substitutes named plaintiffs and relitigates the class certification issue." *Ewing*, 795 F.3d at 1326. And after *Smith*, preclusion rules would provide no impediment to former absent class members'—and their attorneys'—attempts to stack class actions perpetually. *American Pipe* should not be construed to encourage such abusive litigation.

The Ninth Circuit rule, moreover, fundamentally undermines "basic policies of all limitations provisions," i.e., "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). According to the Ninth Circuit itself, the only impediments to perpetual class actions are (i) attorney self-restraint, which

can be elusive to say the least; (ii) preclusion, which does not apply to claims brought by absent class members; and (iii) comity, which is as vague as it is rare. App. 22a. But the whole point of statutes of limitations is to preclude stale claims *without* resort to such nebulous notions and discretionary doctrines. It is one thing to equitably toll limitations period for a short and finite period to allow individuals to bring their own claims. But a rule allowing a string of previously absent class members to try their hand at certifying a class simply cannot be reconciled with the existence of a statute of limitations.

Finally, the court of appeals' rule makes it much more difficult to timely settle disputes. Class certification is often the inflection point at which disputes are settled. Plaintiffs (and their attorneys) are normally unwilling to settle claims before class certification because if a class is certified, the value of the claim increases dramatically. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). If, however, class certification is denied, the parties are often willing to settle individual claims quickly because a contingency-fee plaintiff's attorney has little economic incentive to pursue the claims. Perpetual stacking of class actions distorts this result, because a decision denying class certification does not spell the end of the class action. It merely encourages an attorney to find new plaintiffs and "a district court judge who is willing to certify the class." *Yang*, 392 F.3d at 113 (Alito, J., concurring in part).

Extending *American Pipe* to toll the limitations period for new class actions is thus inconsistent with the equitable principles animating *American Pipe* and *Crown, Cork*—not to mention the purpose of statutes of limitations—and its adoption would lead to significant adverse consequence. The Ninth Circuit's conclusion that *American Pipe*'s equitable tolling rule extends to new class actions should be rejected.

2. a. The court of appeals' contrary conclusion is based on a misunderstanding of the *American Pipe* tolling rule. The court appears to have assumed that *American Pipe* broadly allows for tolling of the limitations period for absent class members' claims, which then can be aggregated under Rule 23. App. 17a. The court, in other words, appears to believe that if an individual is authorized to bring an individual claim, she is also *automatically* authorized to aggregate the claim under Rule 23 so long as that rule's preconditions are satisfied. App. 17a, 21a–22a.

That analysis fundamentally misreads *American Pipe*. As explained earlier, the point of *American Pipe* is to allow absent class members *who want to bring individual actions* to do so without having to resort to wasteful protective litigation. *American Pipe* tolling, in other words, does not apply to absent class members who remain absent, because absent class members who choose to remain absent do not require tolling. *Cf. Menominee Indian Tribe*, 136 S. Ct. at 755 (equitable tolling can apply only when the plaintiff "has been pursuing his rights diligently"). Yet the effect of applying *American Pipe* to follow-on

class actions is to toll the limitations period not only for the new named plaintiffs, but also for individuals who continue to remain absent—i.e., individuals who have shown no interest in pressing their own individuals claims—and thus have no plausible entitlement to tolling. Nothing in *American Pipe*, or in equitable tolling principles more generally, supports that result.

Even setting aside its misreading of *American Pipe*, the court of appeals' reasoning is backwards. Limitations periods apply unless there is some "extraordinary circumstance" that requires the period to be tolled. In other words, when an individual files a claim outside the limitations period, that claim is time-barred *unless* there is some particularly compelling reason to allow it go forward. *American Pipe* and *Crown, Cork* found compelling reasons—allowing absent class members to rely on a pending class action and thereby avoid prophylactic, duplicative litigation—to permit absent class members to bring their own otherwise untimely claims. *See supra* at 23–24. But as just explained, there is no good reason to allow tolling of a limitations period so that a previously absent class member can bring another action on others' behalf. *See supra* at 24–25. In fact, allowing tolling in those circumstances would benefit only plaintiffs' counsel and lead to affirmatively negative consequences. *See supra* at 25–26. The court should thus refuse to expand the tolling of the limitations period to permit plaintiffs to assert untimely claims for not only themselves but also absent class members.

b. The court of appeals relied on three recent cases from this Court that it believed support its reasoning. But those cases are either inapposite or affirmatively refute the Ninth Circuit's conclusion.

The court of appeals cited *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), but that decision is not about tolling at all. It addressed whether, under the *Erie* doctrine, a state law limiting the certifiability of certain classes can bind federal courts sitting in diversity. *See id.* at 398. *Shady Grove* stands for the unexceptional proposition that only Congress, not a state, can create exceptions to the Federal Rules of Civil Procedure. Thus, it holds that all claims that can be brought in federal court can be aggregated under Rule 23, even if such claims could not be aggregated if brought in state court. *Id.* at 398–406. But that holding says nothing about whether *indisputably untimely* claims (like respondents') can be brought as class actions under Rule 23. To the contrary, *Shady Grove* makes clear that Rule 23 "leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Id.* at 408 (plurality opinion). The question whether otherwise untimely claims can nevertheless proceed is answered not under Rule 23, but under the statute of limitations and equitable tolling principles. And those principles unambiguously preclude tolling for the reasons already explained.

The court of appeals next relied on *Smith*, but that decision also did not concern *American Pipe* tolling, and its reasoning actually undermines rather than supports the conclusion below. *Smith*'s central

holding is that when class certification fails, preclusion does not apply to subsequent individual actions brought by absent class members. *See* 564 U.S. at 315. In other words, preclusion is not the proper mechanism to prevent serial re-litigation of class certification. That problem is solved by limiting *American Pipe* tolling as this Court envisioned: to individual claims. Indeed, when *Smith* did mention *American Pipe* in a footnote, it reaffirmed that decision's limitation to individual claims, explaining that "a putative member of an uncertified class may wait until after the court rules on the certification motion to file an *individual claim or move to intervene in the suit*." *Id.* at 313 n.10 (emphasis added).

Finally, the court of appeals cited *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), but it is unclear why—the decision makes no reference to *American Pipe* tolling or the interplay between statutes of limitations and class actions. The court of appeals itself described *Tyson Foods* as considering "whether class action plaintiffs could use statistical sampling evidence to prove liability to a class." App. 20a (citing 136 S. Ct. at 1046–48). That question has nothing to do with the issue presented here.

The decision below, in short, misunderstood the principles underlying *American Pipe* tolling and misconstrued the Court's class action precedents. Under a proper application of the equitable principles animating *American Pipe*, and a faithful reading of this Court's precedents, *American Pipe* tolling applies while a timely filed class action is pending to permit only the filing of otherwise untimely *individual* actions, not follow-on class actions. This Court should

grant certiorari to resolve the circuit conflict on that issue and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A - COURT OF APPEALS OPINION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL H. RESH, On Behalf of Himself and All Others Similarly Situated; WILLIAM SCHOENKE; HEROCA HOLDING, B.V.; NINELLA BEHEER, B.V.,

Plaintiffs-Appellants,

v.

CHINA AGRITECH, INC.; YU CHANG, Company's CEO, President, Secretary, and Chairman of the Board; YAU-SING TANG, AKA Gareth Tang, Company's Chief Financial Officer; GENE MICHAEL BENNETT, Director of CAGC; XIAO RONG TENG, Director of CAGC; MING FANG ZHU; LUN ZHANG DAI, Director of CAGC; CHARLES LAW, AKA Charles C. Law, AKA Charles Chien-Lee Law, AKA Charles Chien-Lee Loh, AKA Chien-Lee C. Loh, Director of CAGC; ZHENG WANG, Director of CAGC,

Defendants-Appellees.

No. 15-55432

D.C. No. 2:14-cv-05083-RGK-PJW

OPINION

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted December 5, 2016
Pasadena, California

Filed May 24, 2017

Before: Stephen Reinhardt, William A. Fletcher,
and Richard A. Paez, Circuit Judges.

Opinion by Judge W. Fletcher

OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs bring a would-be class action alleging that China Agritech, Inc. ("China Agritech") and its managers and directors violated the Securities Exchange Act of 1934 ("Exchange Act"). Plaintiffs were unnamed plaintiffs in two earlier would-be class actions against many of the same defendants based on the same underlying events. Class action certification was denied in both cases. Under *American Pipe & Construction Co v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the statute of limitations was tolled during the pendency of these two suits for plaintiffs' individual claims. There is thus no time bar preventing plaintiffs from bringing the present suit as joined individual claims rather than as a class action. The question before us is whether plaintiffs are time-barred from pursuing their suit as a class action.

For the reasons that follow, we hold that plaintiffs are not time-barred from bringing a class action.

I. Background

China Agritech is a holding company incorporated in Delaware with its principal place of business in Beijing, China. The company claims to operate through various subsidiaries that manufacture and sell organic compound fertilizers and related products to farmers in twenty-eight Chinese provinces. China Agritech began listing its shares on the NASDAQ Stock Exchange in 2005. In a 2009 filing with the U.S. Securities and Exchange Commission ("SEC"), China Agritech reported a net revenue of $76 million, which was triple the $25 million in revenue it reported for 2005.

On February 3, 2011, LM Research, a market research company, published a report entitled "China Agritech: A Scam" ("LM Report"). The report, written by individuals who held a short position in China Agritech stock, asserted that China Agritech was "not a currently functioning business that [was] manufacturing products," but instead was "simply a vehicle for transferring shareholder wealth from outside investors into the pockets of the founders and inside management." Alleging idle factories, minimal investments, and fictitious contracts, the report concluded that China Agritech had "grossly inflated its revenue, failed to account for tens of millions of investor dollars, and [had] virtually no product in the market." Upon release of the LM Report, China Agritech's shares declined from $10.78 per share on February 2, 2011, to $9.85 per share on February 3, 2011.

China Agritech denied the allegations in an eight-page letter to shareholders. On February 15,

2011, Bronte Capital, a hedge fund that also held a short position in China Agritech, responded to China Agritech's letter in an article sarcastically titled, "China Agritech: China's amazing productivity levels" ("BC Article"). The BC Article contended that photos released by China Agritech in its letter did not show the most basic equipment required for operations of the magnitude that China Agritech claimed. For example, the pictures showed 40 kg fertilizer bags being moved manually by individual human laborers rather than with forklifts, calling into question how a factory reported to manufacture 100,000 tons of granular fertilizer annually could possibly operate as depicted. China Agritech's stock value declined to $7.44 per share the next day.

On March 13, 2011, China Agritech announced the formation of a Special Committee of its Board of Directors to investigate the allegations of fraud. The next day, China Agritech dismissed its independent auditor, Ernst & Young Hua Ming ("E&Y"), and publicly disclosed that E&Y had insisted, in December 2010, that the board commence an investigation of accounting problems it had previously identified. Also on March 14, 2011, NASDAQ halted trading in China Agritech stock and initiated delisting proceedings. On October 17, 2012, the SEC issued an enforcement order revoking the registration of China Agritech stock.

II. Procedural History

A. The *Dean* Action

On February 11, 2011, Theodore Dean, on behalf of himself and all others similarly situated, filed a would-be class action against China Agritech and

several of its managers and directors. *See Dean v. China Agritech, Inc.*, Case No. 2:11-cv-1331-RGK-PJW (C.D. Cal.) (the "*Dean* Action"). Dean alleged that China Agritech had materially misstated its net revenue and income for the third quarter in 2009 on its SEC Form 10-Q filing, and had materially misstated its net revenue and income for fiscal years 2008 and 2009 in its 2009 SEC Form 10-K filing. The complaint was filed eight days after release of the LM Report. The case was assigned to Judge Klausner in the Central District of California.

On the same day that the *Dean* Action was filed, Dean's counsel notified China Agritech shareholders of the class action through two global media platforms, Business Wire and GlobeNewswire, inviting shareholders to come forward and serve as lead plaintiff. He repeated the notification a week later. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i). On April 12, 2011, pursuant to § 21D(a)(3)(B) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), six shareholders sought appointment as lead plaintiff and approval of lead counsel. On May 16, 2011, the district court denied without prejudice these motions as premature.

On June 22, 2011, Dean filed an Amended Complaint with four additional named plaintiffs and two additional defendants. The amended *Dean* Action alleged claims for violations of: (1) Section 10(b) of the Exchange Act and SEC Rule 10b-5 by China Agritech and all individual defendants; (2) Section 20(a) of the Exchange Act by the individual defendants; (3) Section 11 of the Securities Act of 1933 ("Securities Act") by all defendants; and (4) Section 15 of the Securities Act by the individual defendants.

On October 27, 2011, the district court granted China Agritech's motion to dismiss the *Dean* plaintiffs' Securities Act claims but denied its motion to dismiss the Exchange Act claims.

On January 6, 2012, the *Dean* plaintiffs moved for class certification on behalf of all persons or entities that had acquired China Agritech stock between November 12, 2009 and March 11, 2011. On May 3, 2012, the district court denied their motion. The court concluded that although the *Dean* plaintiffs had satisfied all four requirements of Rule 23(a), they failed to establish the predominance requirement of Rule 23(b)(3). Reliance is a required element for Section 10(b) securities fraud cases. The district court found that individual issues predominated because the *Dean* plaintiffs had failed to establish a fraud-on-the-market presumption of reliance. A fraud-on-the-market theory requires a showing of market efficiency, which, in the view of the district court, plaintiffs had not made. The court therefore held that plaintiffs had to establish individualized reliance to support their claims.

The *Dean* plaintiffs appealed the denial of certification under Rule 23(f). On August 8, 2012, we affirmed. *See Dean v. China Agritech, Inc.*, Case No. 12-80120 (9th Cir.), Dkt. No. 5. The *Dean* plaintiffs continued litigating their cases as individuals. They settled their individual claims on September 14, 2012. Based on the settlement, their individual claims were dismissed with prejudice on September 20, 2012.

B. The *Smyth* Action

On October 4, 2012, three weeks after the *Dean* Action settled, Kevin Smyth filed an almost identical class-action complaint on behalf of the same would-be class against China Agritech in federal District Court for the District of Delaware. *See Smyth v. Chang*, Case No.1:12-cv-01262-RGA (D. Del.) (the "*Smyth* Action"). The *Smyth* and *Dean* Action complaints differed only in that the *Smyth* Action alleged solely Exchange Act violations and did not name several of the defendants that had been named in the *Dean* Action. The *Smyth* Action was filed one year and eight months after the LM Report was published.

On December 7, 2012, following notification of the *Smyth* Action on Business Wire, pursuant to the PSLRA, eight shareholders sought appointment as lead plaintiff and approval of their selection of lead counsel. The *Smyth* Action was subsequently transferred to the Central District of California, where it was deemed related to the *Dean* Action and assigned to Judge Klausner (Case No. 2:13-cv-3008-RGK-PJW (C.D. Cal.)). On July 18, 2013, plaintiffs in the *Smyth* Action filed an amended complaint with several additional named plaintiffs. On August 5, 2013, the *Smyth* plaintiffs moved for class certification.

On September 26, 2013, the district court denied the motion. The court found that the *Smyth* plaintiffs' personal claims failed the typicality requirement of Rule 23(a)(3) because their prior relationship with named plaintiffs in the *Dean* Action subjected them to a claim preclusion defense that was not available against unnamed class members. The

court further held that the *Smyth* plaintiffs and their counsel failed to meet the adequate representation requirement of Rule 23(a)(4). The court noted that plaintiffs had failed to modify their lead plaintiff certifications that had been signed twenty-nine months earlier in connection with the *Dean* Action, and had served only one defendant ten months after filing *Smyth*.

On January 8, 2014, the parties to the *Smyth* Action agreed to dismiss the action with prejudice as to the named plaintiffs.

C. The *Resh* Action

On June 30, 2014, Michael Resh filed a would-be class action against China Agritech and several individual defendants (the "*Resh* Action"). On September 4, 2014, Resh filed an amended complaint with several additional named plaintiffs. The *Resh* plaintiffs alleged violations of Sections 10(b) and 20(a) of the Exchange Act based on the same facts and circumstances, and on behalf of the same would-be class, as in the *Dean* and *Smyth* Actions. The case was assigned, like the others, to Judge Klausner.

On September 3, 2014, the CAGC Investor Group, comprised of investors in China Agritech—William Schoenke, Heroca Holding B.V., and Ninella Beheer B.V.—filed a motion for appointment as lead plaintiff and for approval of its selection of counsel for the proposed class. On September 22, 2014, China Agritech and one of the individual defendants, Charles Law, filed motions to dismiss the complaint on the theory that the *Resh* plaintiffs' would-be class action was time-barred under the Exchange Act's

two-year statute of limitations. On October 17, 2014, the district court denied without prejudice the CAGC Investor Group's motion, deferring consideration until consideration of class certification ("October 2014 Order").

On December 1, 2014, the district court granted China Agritech's and Defendant Law's motions to dismiss without leave to amend ("December 2014 Order"). Plaintiffs had argued that their would-be class action was timely because *American Pipe* tolled the statute of limitations during the pendency of the *Dean* and the *Smyth* actions. With tolling, 804 of the 1243 days that had elapsed since the release of the LM Report were subtracted, meaning that only 439 days counted towards the two-year statute of limitations. The district court disagreed. It concluded that while the Supreme Court in *American Pipe* and *Crown, Cork & Seal* held that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class, and that a class member may therefore file a separate individual action prior to the expiration of his or her own limitations period, the Supreme Court had not yet determined whether *American Pipe* allowed tolling for an entirely new class action based upon a substantially identical class. Relying principally on *Robbin v. Fluor Corp.*, 835 F.2d 213 (9th Cir. 1987), and *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), the district court concluded that the statute of limitations was tolled for the individual claims of the named plaintiffs in the *Resh* Action, but was not tolled for plaintiffs' would-be class action. In the view of the district court, a contrary ruling "would allow tolling to extend indefi-

nitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence."

On December 19, 2014, the *Resh* plaintiffs sought reconsideration, arguing that the court had denied class certification in the *Dean* and *Smyth* Actions due to issues related to the lead plaintiffs' suitability as class representatives rather than the claims' suitability for class treatment. On January 7, 2015, the district court dismissed the remaining defendants ("January 2015 Order"). On February 23, 2015, it denied plaintiffs' motion for reconsideration ("February 2015 Order"), explaining that "Plaintiffs' class action claims were time-barred regardless of the grounds on which class certification was denied in the two earlier actions."

The *Resh* plaintiffs appealed, challenging the district court's October 2014, December 2014, January 2015, and February 2015 Orders.

III. Standard of Review

We review de novo a district court's order dismissing a suit on statute of limitations grounds. *Sharkey v. O'Neal*, 778 F.3d 767, 770 (9th Cir. 2015).

IV. Jurisdiction

We have jurisdiction under 28 U.S.C. § 1291. Defendants argue that the orders are not appealable final orders because the district court indicated that plaintiffs' individual claims could proceed. We disagree. The district court stated, "Plaintiffs are not prevented from filing a complaint asserting individual, rather than class action, claims . . . if they so

choose." However, this statement did not affect the finality of the court's dismissal "without leave to amend" of the class action complaint that plaintiffs had filed. An invitation to file a complaint in a separate individual suit does not render non-appealable the district court's dismissal.

Defendants also assert that under Federal Rule of Appellate Procedure ("FRAP") 4(a)(7)(A)(ii), plaintiffs were required to wait 150 days after the district court's December 2014 and February 2015 orders before they appealed because the district court's judgment had not been set forth in a separate document, as required under Federal Rule of Civil Procedure ("Rule") 58(a). However, under FRAP 4(a)(7)(B), "[a] failure to set forth a judgment or order on a separate document when required by . . . Rule 58(a) does not affect the validity of an appeal from that judgment or order." "[N]either the Supreme Court nor this court views satisfaction of Rule 58 as a prerequisite to appeal." *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1140 (9th Cir. 2003). Because the district court's order was a full adjudication of the issues that clearly evidenced its intention that the order be final, appellate jurisdiction is proper. *See Nat'l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997).

V. Discussion

We must decide whether the would-be class action brought by the *Resh* plaintiffs is time-barred. It is undisputed that the earlier *Dean* and *Smyth* Actions were timely. It is also undisputed that, under *American Pipe* and *Crown, Cork & Seal*, the statute of limitations for the individual claims of would-be

class members in the *Dean* and *Smyth* Actions was tolled during the pendency of both of those actions. That is, there is no time bar to individual claims brought by plaintiffs who were unnamed class members in the *Dean* and *Smyth* Actions, whether brought as separate or joined claims. The question before us is whether plaintiffs' would-be class action, based on those same claims, is time-barred.

A. *American Pipe and Crown, Cork & Seal*

The Supreme Court has twice addressed tolling issues arising out of the dismissal of a would-be class action when no class has been certified. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Court held that unnamed members of an uncertified class could intervene as individual plaintiffs in the individual suit that remained even if the statutory limitations period had passed. *Id.* at 550–56. According to the Court, "the commencement of the original class suit tolls the running of the statute [of limitations] for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 553. The Court characterized its tolling rule as serving policies underlying statutes of limitations as well as class actions. Recognizing that limitations periods serve "[t]he policies of ensuring essential fairness to defendants and of barring a plaintiff who 'has slept on his rights,'" *id.* at 554, the Court concluded that such policies would be vindicated when a named plaintiff "commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *Id.*

at 554–55. Not permitting tolling would frustrate the goal of Rule 23 to promote economy in litigation because, absent tolling, "[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable." *Id.* at 553.

In *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), the Supreme Court extended *American Pipe* to permit tolling not only for individual intervention in the named plaintiffs' original suit, but also for individual filing of entirely new suits. The Court wrote that many of "the same inefficiencies [discussed in *American Pipe*] would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification." *Id.* at 350. Specifically, if the statute of limitations for new individual claims were not tolled, "[t]he result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Id.* at 351. Because the commencement of a class suit already "put[s] defendants on notice of adverse claims," the goals underlying statutes of limitations would not be undermined by a broader tolling rule. *Id.* at 352. The Court concluded, "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 354.

B. *Catholic Social Services* and Later Cases

Under *American Pipe* and *Crown, Cork & Seal*, it is clear that the individual claims of the would-be class members in the *Resh* Action have been tolled during the pendency of earlier class actions. Those class members may intervene in existing individual suits, or may bring entirely new individual suits. Plaintiffs bringing new suits may sue either separately or jointly. *American Pipe* and *Crown, Cork & Seal* leave open the question whether such plaintiffs may bring a new suit as a class action.

In a short opinion published thirty years ago, we held that "the pendency of a class action [does not] toll[] the applicable statutes of limitation for a subsequently filed class action." *Robbin v. Fluor Corp.*, 835 F.2d 213, 213 (9th Cir. 1987). Relying principally upon a Second Circuit opinion, we concluded that "extend[ing] tolling to class actions 'tests the outer limits of the *American Pipe* doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'" *Id.* at 214 (citing *Korwek v. Hunt*, 827 F.2d 874, 879 (2d. Cir. 1987)). In *Korwek*, our sister circuit had held that "the tolling doctrine enunciated in *American Pipe* does not apply to permit a plaintiff to file a subsequent class action following a definitive determination of the inappropriateness of class certification." 827 F.2d at 879. Its rationale was that "[t]he Supreme Court in *American Pipe* and *Crown, Cork* certainly did not intend to afford plaintiffs the opportunity to argue and reargue the question of class certification by filing new but repetitive complaints." *Id.*

We modified *Robbin* in 2000. In *Catholic Social Services, Inc. v. INS*, 232 F.3d 1139 (9th Cir. 2000) (en banc), the district court had certified a class, but an intervening change in the law eliminated subject matter jurisdiction over the claims of the named plaintiffs. *Id.* at 1143–44. New plaintiffs then brought a second class action based on the same underlying facts against the same institutional defendants. *Id.* at 1144. The question before us was whether the pendency of the prior class action tolled the statute of limitations for the second action. *Id.* at 1145. We held that it did. *Id.* at 1149. In so holding, we clarified the analytic structure in which the *American Pipe* tolling analysis applies to future class actions:

> There is no dispute that if members of the class . . . had filed individual actions after the dismissal of their class action, the statute of limitations would have been tolled for those individual actions. . . . The only question in this case is whether those same plaintiffs should be permitted to aggregate their individual actions into a class action. *Strictly speaking, this is not a statute of limitations question at all. It is, rather, a question of whether plaintiffs whose individual actions are not barred may be permitted to use a class action to litigate those actions.*

Id. at 1147 (emphasis added).

Defendants read our opinion in *Catholic Social Services* as denying tolling for plaintiffs in certain

categories of class action denials. They rely principally on a passage in which we wrote, "If class action certification had been denied in [an earlier case], and if plaintiffs in this action were seeking to relitigate the correctness of that denial, we would not permit plaintiffs to bring a class action." *Id.* Two of our sister circuits may have read *Catholic Social Services* similarly. *See Yang v. Odom*, 392 F.3d 97, 107 (3d Cir. 2004) ("*Catholic Social Services* can be read as authority for our holding that class claims should be tolled where the district court denies class certification based on deficiencies of a class representative, and not on the validity of the class itself."); *Great Plains Tr. Co. v. Union Pac. R.R. Co.*, 492 F.3d 986, 997 (8th Cir. 2007) ("Whether the *American Pipe* rule applies to subsequent class actions . . . depends on the reasons for the denial of certification of the predecessor action.").

This is a misreading of *Catholic Social Services*. We did indeed write that "we would not permit plaintiffs to bring a class action" if they sought to serially re-litigate a previous denial of certification. 232 F.3d at 1147. However, we did not write that the availability of a subsequent class action depended on general tolling principles. Rather, its availability depended on the operation of preclusion and preclusion-related principles. *See id.* For example, if plaintiffs in *Catholic Social Services* had been named plaintiffs in the earlier suit, if an issue relating to the propriety of the class action had been resolved against them, if their earlier suit had been dismissed with prejudice based on that ruling, and if plaintiffs had then sought to bring a new class action raising

that same issue, they would have been barred by issue preclusion from raising that issue.

Three recent Supreme Court decisions have confirmed this view. First, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), the Court rejected an argument by defendant Allstate that only certain categories of claims are eligible for class treatment under Rule 23. The Court wrote:

> There is no reason . . . to read Rule 23 as addressing only whether claims made eligible for class treatment by some *other* law should be certified as class actions. Allstate asserts that Rule 23 neither explicitly nor implicitly empowers a federal court "to certify a class in each and every case" where the Rule's criteria are met. But that is *exactly* what Rule 23 does[.]

Id. at 399 (emphases in original and internal citation omitted). *Shady Grove* directs us, for purposes of class certification, to look only to the criteria of Rule 23 and not to "some other law." There is nothing in the certification criteria of Rule 23 that tells us to look to whether the statute of limitation has, or has not, been tolled. That is, the statute of limitations is not part of Rule 23 but is, instead, "some other law."

After *Shady Grove*, the Seventh Circuit explicitly adopted our general approach in *Catholic Social Services* in treating the issue of successive would-be class actions as an issue of preclusion rather than tolling. In *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011), the court

held that the overarching inquiry in determining whether prior class actions can toll future class actions is "not the statute of limitations or the effects of tolling, but the preclusive effect of a judicial decision in the initial suit applying the criteria of Rule 23." *Id.* at 563. "To the extent that [another court] may believe that Rule 23 must be set aside when a suit's timeliness depends on a tolling rule, that view cannot be reconciled with the Supreme Court's later decision in *Shady Grove* . . . , which holds that Rule 23 applies to all federal civil suits, even if that prevents achieving some other objective that a court thinks valuable." *Id.* at 564.

Second, in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), the Court refused to allow a federal district court to enjoin a state court from certifying a class. The federal court had denied class certification of a class in a would-be class action against Bayer. *Id.* at 304. A parallel would-be class action was pending in state court, brought by different named plaintiffs than the named plaintiffs in federal court. *Id.* at 303. After the federal court ruled, it enjoined the state court from certifying the class in the case before that court, relying on the "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283. *Id.* at 304–05. The Supreme Court reversed, pointing out, *inter alia*, that the named plaintiffs in the state court suit had been unnamed members of the uncertified class in federal court, and that they had thus never been made parties to the federal court suit. *Id.* at 316–18. In that circumstance, there was no basis to apply formal preclusion principles against them, and thus no basis to enjoin the state court from certifying the class action. *Id.*

The Court in *Smith* acknowledged Bayer's argument that "serial relitigation of class certification" was unfair to defendants, and that defendants "would be forced in effect to buy litigation peace by settling." *Id.* at 316 (internal quotation marks omitted). The Court responded that Bayer's "form of argument flies in the face of the rule against nonparty preclusion." *Id.* Its answer to Bayer's concern was that traditional principles of *stare decisis* and comity, combined with the possibility of removal under the Class Action Fairness Act or consolidation by the Panel on Multidistrict Litigation, were adequate to the task of protecting defendants. *Id.* at 316–18. Though the question of sequential class action litigation in two or more federal courts, as distinct from such litigation in federal and state court, was not presented in the case before it, the Court nonetheless addressed that question. The troublesome case, of course, is one in which the plaintiffs were unnamed plaintiffs in an earlier uncertified class action in federal court and were therefore not subject to issue preclusion, and in which the plaintiffs later seek to bring an identical or substantially similar would-be class action in federal court. With respect to such a case, the Court wrote, "[W]e would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute." *Id.* at 317.

Two years later, the Sixth Circuit had occasion to apply both *Shady Grove* and *Smith*. In *Phipps v. Wal-Mart Stores, Inc.*, 792 F.3d 637 (6th Cir. 2015), with respect to tolling, the Sixth Circuit cited and followed the Seventh Circuit's decision in *Sawyer*. *Id.* at 652. With respect to preclusion, the court relied

on *Smith*. Wal-Mart, like Bayer in *Smith*, objected that allowing repeated litigation of class action certification questions by different named plaintiffs would force defendants "to settle to buy peace." *Id.* at 653. The court responded that Wal-Mart's concerns "need not bar legitimate class action lawsuits or distort the purposes of *American Pipe* tolling. Instead, we follow the Supreme Court's lead and trust that existing principles in our legal system, such as *stare decisis* and comity among courts, are suited to and capable of addressing these concerns." *Id.*

Third and finally, in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046–48 (2016), the Supreme Court considered whether class action plaintiffs could use statistical sampling evidence to prove liability to a class. The Court held that they could, reasoning that "[i]n a case where representative evidence is relevant in proving a plaintiff's individual claim, that evidence cannot be deemed improper merely because the claim is brought on behalf of a class." *Id.* at 1046. To hold otherwise would be to "ignore the Rules Enabling Act's pellucid instruction that use of the class device cannot 'abridge . . . any substantive right.'" *Id.* (quoting 28 U.S.C. § 2072(b)). We recognize that for purposes of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the Rules Enabling Act, statutes of limitation occupy a no-man's land between substance and procedure. *See Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532–34 (1949) (in a suit based on state-law cause of action applying state tolling rule rather than Federal Rule of Civil Procedure 3); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 748–53 (1980) (same); *West v. Conrail*, 481 U.S. 35, 37–40 (1987) (in

a suit based on a federal-law cause of action applying Rule 3). We therefore do not regard the Court's reasoning in *Tyson Foods* as compelling a holding that the Rules Enabling Act requires that the statute of limitations apply the same way in both individual and class actions. But *Tyson Foods*, when read in combination with *Shady Grove* and *Smith*, nonetheless reinforces our conclusion that the statute of limitations does not bar a class action brought by plaintiffs whose individual actions are not barred.

C. Plaintiffs' Would-be Class Action Is Not Time-barred

We conclude, based on *American Pipe* and *Crown, Cork & Seal*, read in the light of *Shady Grove*, *Smith* and *Tyson Foods*, that permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place. The rule creates no unfair surprise to defendants because the pendency of a prior class suit has already alerted them "not only [to] the substantive claims being brought against them, but also [to] the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 554–55. The rule also promotes economy of litigation by reducing incentives for filing duplicative, protective class actions because "[a] putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations." *Crown, Cork & Seal*, 462 U.S. at 350–51.

We further conclude, based on *Smith*, that to the degree that our conclusion may be thought likely to lead to abusive filing of repetitive class actions, the current legal system is adequate to respond to such a concern. First, if it is clear that a proposed class is not viable under Rule 23, as evidenced by an earlier federal court decision, potential future plaintiffs (or, more precisely, their attorneys) will have little to gain from repeatedly filing new suits. Attorneys who are going to be paid on a contingency fee basis, or in some cases based on a fee-shifting statute, at some point will be unwilling to assume the financial risk in bringing successive suits. Second, ordinary principles of preclusion and comity will further reduce incentives to re-litigate frivolous or already dismissed class claims, and will provide a ready basis for successor federal district courts to deny class action certification.

In light of the above, we conclude that plaintiffs' class action complaint is not time-barred. Plaintiffs' individual claims were tolled under *American Pipe* and *Crown, Cork & Seal* during the pendency of the *Dean* and *Smyth* Actions. So long as they can satisfy the criteria of Rule 23, and can persuade the district court that comity or preclusion principles do not bar their action, they are entitled to bring their timely individual claims as named plaintiffs in a would-be class action.

Conclusion

We hold that plaintiffs' class action claims are timely. Because we so hold, we do not reach plaintiffs' additional arguments. We reverse the district

court's order of dismissal and remand for further proceedings consistent with this opinion.

REVERSED and **REMANDED.**

APPENDIX B - DISTRICT COURT DECEMBER 1, 2014 OPINION

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-05083-RGK (PJWx)

Date December 1, 2014

Title ***RESH, et al. v. CHINA AGRITECH, INC., et al.***

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present)
Deputy Clerk

Not Reported
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) Order re: Defendants Charles Law and China Agritech, Inc.'s Motions to Dismiss (DE 27, 28)

I. INTRODUCTION

On September 4, 2014, Michael H. Resh ("Resh"), William Schoenke, Heroca Holding B.V., and Ninella Beheer B.V. (collectively, "Plaintiffs") filed an Amended Class Action Complaint ("FAC") against China Agritech, Inc. ("China AG") and members of

the company's executive management team and board of directors ("Individual Defendants"). Plaintiffs allege violations of: (1) Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Securities and Exchange Commission ("SEC") Rule 10b-5 against China AG and Individual Defendants; and (2) Section 20(a) of the Exchange Act against Individual Defendants. Among the Individual Defendants named in the FAC is Charles Law ("Defendant Law" or "Law").

Plaintiffs bring this class action on behalf of all persons and entities who purchased the publicly traded common stock of China AG between November 12, 2009 and March 11, 2011 (the "Class Period"). Class actions on behalf of classes identical to that in the present case have been filed with this Court on two prior occasions, in actions entitled *Dean v. China Agritech, Inc.*, No. CV 11-01331-RGK (PJWx), 2011 WL 5148598 (C.D. Cal. Oct. 27, 2011), and *Smyth v. Yu Chang*, No. CV 13-03008-RGK (PJWx) (C.D. Cal. filed Apr. 19, 2012).

Presently before the Court are motions to dismiss filed by China AG and Defendant Law (the "Moving Defendants"). In Defendant Law's motion, he joins in China AG's motion, and adopts and incorporates it by reference. (*See* Defendant Law's Mot. 1 n.1, 18:2-5.) For the following reasons, the Court **GRANTS** Moving Defendants' motions.

II. FACTUAL BACKGROUND

China AG is a holding company incorporated in the state of Delaware with its principal place of business in Beijing, China. China AG manufactures and distributes organic compound fertilizers for ag-

ricultural application in China. The company was publicly traded within the United States as a result of a financial technique known as a "reverse merger." In a reverse merger, a private company seeking to trade or sell shares in public equity markets acquires a publicly traded shell company in order to quickly go public and avoid certain regulatory requirements. Once the reverse merger is complete, management of the former private company generally takes control of the merged company. China AG completed its merger in 2005 and began publicly offering its stock on the NASDAQ stock exchange. On October 17, 2012, the SEC issued an enforcement order revoking the registration of China AG's stock.

Defendant Law was a director of China AG from January 2010 until his resignation in February 2011. During this time, Law also served on the Compensation and Nominating and Governance Committees. In 2005, prior to Defendant Law's appointment as a director, his law firm, King & Wood, represented China AG in connection with its initial reverse merger registration.

Plaintiffs are four individual investors who allegedly purchased China AG's common stock between November 12, 2009 and March 11, 2011.

A. Alleged Wrongful Conduct

Plaintiffs allege that China AG materially misstated its net revenue and income for the third quarter of 2009 on its SEC Form 10-Q filing. Plaintiffs allege that China AG also materially misstated its net revenue and income for fiscal years 2008 and 2009 in its 2009 SEC Form 10-K filing. Plaintiffs further allege that Defendants concealed related-

party transactions between a China AG subsidiary and a third-party supplier owned by one of the Individual Defendants.

On February 3, 2011, Lucas McGee Research published a report ("LM Report") contending that China AG was a fraud and alleging that the company's factories were either non-operational or were producing far less than reported. The report further stated that China AG had filed financial statements with the SEC for fiscal year 2009 that showed substantially larger net revenue than China AG reported in filings to the Chinese State Administration for Industry and Commerce ("SAIC") for the same period. After publication of the report, the value of China AG stock declined from $10.78 per share on February 2, 2011, to $9.85 per share on February 3, 2011, representing a day-over-day decline of 8.63%. On February 15, 2011, Bronte Capital issued a report ("BC Report") with similar allegations about China AG's production levels. China AG's stock value again declined from $9.21 per share on February 4, 2011 to $7.44 per share on February 16, 2011, a decline of approximately 16%. As a result of Defendants' actions, Plaintiffs allegedly suffered damages in connection with the purchase of their China AG stock.

Plaintiffs allege that during this time, Individual Defendants, including Defendant Law, acted as controlling persons of China AG. Each of these Individual Defendants had direct and supervisory involvement in the day-to-day operations of China AG and were directly or indirectly involved in the dissemination of the various fraudulent statements.

B. Related Cases

As discussed, class actions involving substantially similar allegations against China AG and classes identical to the present one proposed by Plaintiffs have previously been filed twice before this Court.

The complaint in *Dean* was filed on February 11, 2011. On May 3, 2012, this Court denied the *Dean* plaintiffs' motion for class certification because the plaintiffs failed "to establish that questions of law or fact common to class members predominate[d] over any questions affecting only individual members," as was necessary for class certification pursuant to Federal Rule of Civil Procedure ("Rule") 23(b)(3). (Order Den. Mot. Class Cert. at 7, *Dean v. China Agritech, Inc.*, No. CV 11-01331-RGK (PJWx) (C.D. Cal. Oct. 27, 2011), ECF No. 134.)

Subsequently, the complaint in *Smyth* was filed on October 4, 2012. On September 26, 2013, this Court denied the *Smyth* plaintiffs' motion to certify the class. (Order Den. Mot. Class Cert., *Smyth v. Yu Chang*, No. CV 13-03008-RGK (PJWx) (C.D. Cal. filed Apr. 19, 2012), ECF No. 112.) The motion was denied largely because plaintiffs failed to satisfy the "typicality" and "adequacy of representation" requirements of Rule 23(a)(3)-(4). (*Id.* at 4-7.) On January 2, 2013, all claims asserted by plaintiffs were voluntarily dismissed with prejudice. (*See generally* Order Granting Mot. Dismiss, *Smyth v. Yu Chang*, No. CV 13-03008-RGK (PJWx) (C.D. Cal. filed Apr. 19, 2012), ECF No. 136.)

III. JUDICIAL STANDARD

Under Rule 12(b)(6), a party may move to dismiss for failure to state a claim upon which relief may be

granted. Fed. R. Civ. P. 12(b)(6). In deciding a Rule 12(b)(6) motion, the court must assume allegations in the challenged complaint are true, and construe the complaint in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Although the complaint need not contain detailed factual allegations, it must provide more than a "formulaic recitation of the elements of a claim." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Furthermore, a pleading must contain sufficient factual matter that, if accepted as true, states a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible when there are sufficient factual allegations to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* Dismissal is appropriate "only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mediondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

IV. DISCUSSION

A. Plaintiffs' Class Action Is Barred by the Statute of Limitations

Moving Defendants argue that Plaintiffs' class action claims are barred by the statute of limitations and, therefore, should be dismissed. The Court agrees.

A securities fraud claim must be filed no later than the earlier of (1) two years after the facts constituting the violation were, or reasonably should have been, discovered, or (2) five years after the violation occurred. 28 U.S.C. § 1658(b); *see also Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) (holding "that 'discovery' as used in this statute encompasses not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known."). Here, Plaintiffs do not contest that the LM and BC Reports, published in February 2011, sufficiently provided notice that the alleged fraud occurred. As such, the two-year statute of limitations began to run at that time. Three years later, in June 2014, Plaintiffs filed their original Complaint.

Plaintiffs do not dispute that, absent the *Dean* and *Smyth* actions, the statute of limitations would have run by the time they filed their Complaint. Instead, Plaintiffs assert that the statute of limitations was tolled during the pendency of the foregoing actions, and the Complaint was therefore timely. In order for Plaintiffs to succeed in this argument, the Court must find that the statute of limitations tolled during the pendency of not only one, but *both* of the prior actions.

The commencement of a class action can suspend the applicable statute of limitations, but only under certain circumstances. In *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), the Supreme Court held that if the statute of limitations expires during the pendency of a class action, "the commencement of the original class suit tolls the running of the statute for all purported members of

the class who make timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 553-54. In *Crown, Cork & Seal Company v. Parker*, 462 U.S. 345 (1983), the Supreme Court expanded on its opinion in *American Pipe*, ruling that tolling is appropriate not only where plaintiffs sought to intervene in a continuing action, but also where they sought to file an entirely new action as individual plaintiffs. *Id.* at 349-50, 353-54. The Supreme Court has not, however, determined whether tolling allows the above-mentioned individuals to bring an entirely new *class action* based upon a substantively identical class. This is the issue presently before the Court.

The Ninth Circuit first addressed this issue in *Robbin v. Fluor Corporation*, 835 F.2d 213 (9th Cir. 1987). There, similar to the present case, a securities fraud class action was filed after a class action based on the same alleged fraud had been denied certification and voluntarily dismissed. *Id.* at 214. The applicable statute of limitations had expired, and the Ninth Circuit held that the statute of limitations was not tolled as to the class action during the prior action. *Id.* In reaching its decision, the court recognized that several out-of-circuit courts had rejected the position that "the tolling doctrines of *American Pipe* and *Crown, Cork* should be extended to include class members who file subsequent class actions." *See id.* (citing *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir.1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir.1985), *cert. denied*, 475 U.S. 1035 (1986)). The court agreed with those decisions, and held "that to extend tolling to class actions 'tests the outer limits of the *Ameri-*

can Pipe doctrine and . . . falls beyond its carefully crafted parameters into the range of abusive options.'" *Robbin*, 835 F.2d at 214 (quoting *Korwek*, 827 F.2d at 879).[1]

Plaintiffs do not address *Robbin*. Instead, Plaintiffs cite to *Catholic Social Services, Inc. v. I.N.S.*, 232 F.3d 1139 (9th Cir. 2000) (en banc) as support for the proposition that tolling applies to the class action as long as class certification has not been previously denied on the ground that the claims were not suitable for class treatment. However, *Catholic Social Services* does not provide such support.

In *Catholic Social Services*, the Ninth Circuit found that tolling was warranted where the class had originally been certified on two occasions, but was dismissed after a statutory enactment stripped the courts of jurisdiction over certain of plaintiffs' claims. 232 F.3d at 1144-49. Following the dismissal, plaintiffs promptly filed a new class action with the district court. *Id.* at 1144. Although the new class action was filed after the statute of limitations had expired, the Ninth Circuit held that "the statute of limitations was tolled during the pendency of the first class action[.]" *Id.* at 1150. In doing so, the court emphasized that "there is no dispute in the case that the classes in the first action were properly certified." *Id.* at 1149.

The court was careful to distinguish two sets of cases. The first was *Robbin* (in turn relying on *Kor-*

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[1] In *Robbin*, the court held that the tolling doctrine of *American Pipe* did apply to preserve an *individual* action that was filed along with the class action. 835 F.2d at 215.

wek, 827 F.2d 874), in which the Ninth Circuit "interpreted *American Pipe* not to allow tolling . . . when the second action is no more than an attempt to relitigate the issue of class certification and thereby to circumvent the earlier denial." *Id.* at 1147. The second set of cases were decided by the Eleventh, Fifth, and Sixth Circuits, as well as various district courts, which applied the rule in *Robbin* and *Korwek* "to cases in which a later class of plaintiffs [did] not disagree with the denial of class certification, but rather [tried] to cure the deficiency that led to the denial." *Id.* at 1147-48 (citing *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994); *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988); *Salazar–Calderon*, 765 F.2d 1334, 1351 (5th Cir. 1985)). The court explained that "[p]laintiffs in the class action now before us . . . do not seek to cure any procedural deficiencies in the classes under Rule 23 certified in the first action because there were none." *Id.* at 1149. The court's ultimate holding therefore turned on the fact that "[p]laintiffs in this case are not attempting to relitigate an earlier denial of class certification, or to correct a procedural deficiency in an earlier would-be class." *Id.*

Catholic Social Services does not support Plaintiffs' argument in the present case. Unlike in *Catholic Social Services*, where the class was properly certified twice, here class certification has been denied on two separate occasions in the *Dean* and *Smyth* actions. Whether the Court construes the current class action as an attempt to relitigate the two earlier denials or to correct procedural deficiencies in the earlier would-be classes, *Catholic Social Services* indicates that tolling does not apply.

Plaintiffs appear to read the Ninth Circuit's use of the term "procedural deficiencies" as referring solely to deficiencies related to the lead plaintiff's suitability as class representative, to the exclusion of deficiencies related to the suitability of the claims for class treatment. (*See* Pls.' Opp'n 13:6-14:3.) However, the Court finds no support in *Catholic Social Services* for such an interpretation. To the contrary, that decision indicates that the term "procedural deficiencies" does in fact apply to the suitability of claims for class treatment. As discussed, the Ninth Circuit was careful to distinguish, among other cases, the Fifth Circuit's decision in *Salazar-Calderon*, and at least implicitly approved of that decision. In discussing *Salazar-Calderon*'s holding that tolling was improper, the Ninth Circuit noted that class certification in that case "was denied for failure to satisfy the predominance and superiority criteria of Rule 23(b)(3)." *Catholic Social Services*, 232 F.3d at 1148. This failure fundamentally goes to the suitability of the claims for class treatment, and has nothing to do with the suitability of the class representative.

Plaintiffs also cite two Central District of California decisions rendered post-*Catholic Social Services*, but those decisions are similarly unavailing. First, *In re Toys "R" Us*, No. MDL 08-01980-MMM (FMOx), 2010 WL 5071073 (C.D. Cal. Aug. 17, 2010), affirms the Ninth Circuit's focus on whether the Plaintiff is seeking to relitigate an earlier denial of certification or correct a procedural defect. *Id.* at *14. It did not parse the term "procedural," as Plaintiffs do, and the issue of tolling arose in the unrelated context of plaintiffs seeking to certify subclasses in a piecemeal fashion. *Id.* at *14-15. The second case, *In re Ameri-*

can Funds Securities Litigation, 556 F. Supp. 2d 1100 (C.D. Cal. 2008), was vacated and remanded on appeal. *See* 395 F. App'x 485 (9th Cir. 2010). In any event, the district court's decision actually undermines Plaintiffs' position. In *American Funds Securities Litigation*, the court noted *Catholic Social Services*' emphasis on the fact that the class had been properly certified in the first instance. 556 F. Supp. 2d at 1112. It then went on to distinguish *Catholic Social Services* and find that tolling was not proper in part because – as is true in the present case – "no class has ever been certified by this Court . . . ." *Id.*

Even if the Court were to adopt Plaintiffs' interpretation of the law, tolling would still be impermissible. The Court previously denied certification of this same putative class in the *Dean* action on the ground that the claims were not suitable for class treatment. Specifically, the Court found that plaintiffs failed to establish the "predominance" requirement of Rule 23(b)(3).

A plaintiff asserting securities fraud under Section 10(b) of the Exchange Act must prove that he or she relied upon a material misrepresentation when purchasing stock. *See Basic, Inc. v. Levinson*, 485 U.S. 224, 242-43 (1988). To invoke a presumption of reliance in showing that it can be determined on a class-wide rather than individual basis, plaintiffs must establish that the defendant made a material misrepresentation that directly caused the rise in stock. *See Connecticut Ret. Plans & Trust Funds v. Amgen Inc.*, 660 F.3d 1170, 1172 (9th Cir. 2011). In *Dean*, this Court found that the plaintiffs' expert, and as a result the plaintiffs, failed to establish "a causal relationship between [China AG's] disclosures

and movement in the price of its stock." (Order Den. Mot. Class Cert. at 7, *Dean v. China Agritech, Inc.*, No. CV 11-01331-RGK (PJWx) (C.D. Cal. Oct. 27, 2011), ECF No.134.) As such, the plaintiffs were unable to invoke the presumption of reliance and therefore failed to show that the issue of reliance could be determined on a class-wide, rather than individual, basis. It was for this reason that class certification was denied.

Plaintiffs argue that this denial "was based upon the particular lead plaintiffs' experts' deficiencies rather than any suitability of the claims for class treatment." (Pls.' Opp'n 8:5-8:7, ECF No. 35.) Put differently, Plaintiffs argue that class certification was denied not because the claims were not suitable for class certification, but rather, because the plaintiffs *failed to establish* that the claims were not suitable for class certification. The Court finds this argument unpersuasive, as it would allow tolling to extend indefinitely as class action plaintiffs repeatedly attempt to demonstrate suitability for class certification on the basis of different expert testimony and/or other evidence.

For the foregoing reasons, the Court finds that the statute of limitations did not toll as to a class action during the pendency of the *Dean* or *Smyth* actions. Therefore, Plaintiffs' claims are barred as untimely. Further, because amendment "could not possibly cure th[is] deficiency," *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 742 (9th Cir. 2008), the Court **grants** Moving Defendants' Motions to Dismiss without leave to amend.

B. Defendant Law's Remaining Arguments

Defendant Law also argues that Plaintiffs' FAC fails to state a claim for relief pursuant to Rule 12(b)(6). Defendant Law argues that Plaintiffs' FAC, as it relates to him, fails to allege facts sufficient to satisfy the heightened pleading standards of Rule 9(b) and the Private Securities Litigation Reform Act. However, as the Court is dismissing the FAC on other grounds, it need not decide this issue.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS without leave to amend** Moving Defendants' Motions to Dismiss. Plaintiffs are hereby ordered to show cause in writing no later than December 8, 2014 as to why the Motions to Dismiss should not be granted as to the remaining defendants.

IT IS SO ORDERED.

APPENDIX C - DISTRICT COURT FEBRUARY 23, 2015 OPINION

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 14-05083 RGK (PJWx)

Date February 23, 2015

Title ***RESH, et al. v. CHINA AGRITECH, INC., et al.***

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present)
Deputy Clerk

Not Reported
Court Reporter / Recorder

N/A
Tape No.

Attorneys Present for Plaintiffs: Not Present

Attorneys Present for Defendants: Not Present

Proceedings: (IN CHAMBERS) Order Re: Plaintiffs' Motion for Reconsideration (DE 45)

I. INTRODUCTION

On September 4, 2014, Michael H. Resh, William Schoenke, Heroca Holding B.V., and Ninella Beheer B.V. (collectively, "Plaintiffs") filed an Amended Class Action Complaint ("FAC") against China

Agritech, Inc. ("China AG") and members of the company's executive management team and board of directors ("Individual Defendants"). Plaintiffs alleged violations of: (1) Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Securities and Exchange Commission ("SEC") Rule 10b-5 against China AG and Individual Defendants; and (2) Section 20(a) of the Exchange Act against Individual Defendants. Among the Individual Defendants named in the FAC was Charles Law ("Law").

Plaintiffs brought this class action on behalf of all persons and entities who purchased the publicly traded common stock of China AG between November 12, 2009 and March 11, 2011. Class actions on behalf of classes identical to that in the present case had been filed with this Court on two prior occasions, in actions entitled *Dean v. China Agritech, Inc.*, No. CV 11-01331-RGK (PJWx) (C.D. Cal. filed Feb. 11, 2011), and *Smyth v. Yu Chang*, No. CV 13-03008-RGK (PJWx) (C.D. Cal. filed Apr. 19, 2012).

On September 22, 2014, China AG and Law filed motions to dismiss the FAC. On December 1, 2014, the Court granted both motions without leave to amend on the ground that Plaintiffs' class action claims were barred by the statute of limitations. (*See* ECF No. 43.)

Presently before the Court is Plaintiffs' Motion for Reconsideration (the "Motion"). For the following reasons, the Court **DENIES** the Motion.

II. JUDICIAL STANDARD

Pursuant to Federal Rule of Civil Procedure 59(e), a "motion to alter or amend a judgment must

be filed no later than 28 days after the entry of judgment." A court should grant the motion "sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Thus, "amendment or alteration is appropriate . . . if (1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law." *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 420 F. Supp. 2d 1070, 1075 (N.D. Cal. 2006).

California Local Rule 7-18 provides that a motion for reconsideration may be made only on the grounds of:

> (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

C.D. Cal. L.R. 7-18.

A "motion for reconsideration must accomplish two goals. First, a motion for reconsideration must demonstrate reasons why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Francis v. Bryant*, CV F 04 5077 AWI, 2006 WL 1627917, at *1 (E.D. Cal. June 7, 2006) (citing *Donaldson v. Liberty Mut. Ins. Co.*, 947 F. Supp. 429, 430 (D. Haw. 1996)). A motion for reconsideration should not be used to reargue the motion or present evidence that should have been presented prior to the entry of judgment. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (citations omitted).

III. DISCUSSION

Plaintiffs base their Motion for Reconsideration on four grounds. The Court addresses each in turn.

A. Tolling of Individual Claims

First, Plaintiffs assert that the Court failed to consider the material "fact" that Plaintiffs' individual claims are tolled and not barred by the statute of limitations. Even assuming this qualifies as a "fact" under subsection (c) of Local Rule 7-18, the Court did not fail to consider it. To the contrary, the Court noted the Ninth Circuit's holding in *Robbin v. Fluor Corporation*, 835 F.2d 213, 215 (9th Cir. 1987), that tolling applies to an individual action even though the class action is barred. (*See* ECF No. 43 at 4 n.1.) In keeping with that holding, the Court held that "the statute of limitations did not toll *as to a class action* during the pendency of the *Dean* or *Smyth* actions," and dismissed "Plaintiffs' class action Com-

plaint with prejudice." (*Id.* at 6 (emphasis added).) As the Court noted in its order dated January 7, 2015, "Plaintiffs are not prevented from filing a complaint asserting individual, rather than class action, claims against [the defendants] if they so choose." (ECF No. 50.)

B. Grounds for Denial of Class Certification in *Dean*

Plaintiffs next argue that the Court erred in finding that it denied class certification in the *Dean* action on the ground that the claims were not suitable for class treatment. In their opposition to China AG's motion to dismiss, Plaintiffs maintained that unless class certification was denied on that ground, rather than due to issues related to the lead plaintiff's suitability as class representative, Plaintiffs' claims were not time-barred.

Yet Plaintiffs simply seek to reargue an issue they already briefed in their opposition. (*See, e.g.*, ECF No. 35 at 7:5-8:19, 9:13-10:9, 12:12-15:18.) This is improper, as "[a] motion for reconsideration is not a vehicle to reargue the motion." *Brown v. U.S.*, Nos. CV 09-8168 ABC, CR 03-847 ABC, 2011 WL 333380, at *3 (C.D. Cal. Jan. 31, 2011) (quotations omitted). To the extent Plaintiffs point to excerpts of the Court's orders in *Dean* or *Smyth* which Plaintiffs did not explicitly quote in their opposition, they impermissibly "present evidence for the first time when [it] could reasonably have been raised earlier in the litigation." *Marlyn Nutraceuticals*, 571 F.3d at 880. Moreover, Plaintiffs do not make a "manifest showing" that the Court failed to consider the language they cite. To the contrary, the Court did consider

that language; Plaintiffs simply disagree with the Court's holding.

Also, the Court's holding on this issue was an alternative basis for its decision. The primary holding was that Plaintiffs' class action claims were time-barred regardless of the grounds on which class certification was denied in the two earlier actions. (*See* ECF No. 43 at 4-5.) Thus, even if Plaintiffs' argument had merit (it does not), it would not provide a basis for the Court to alter or amend the judgment.

C. Plaintiffs' Citation to *Robbin v. Fluor Corp.*

Plaintiffs take issue with the Court's statement that "Plaintiffs do not address *Robbin* [*v. Fluor Corporation*, 835 F.2d 213 (9th Cir. 1987)]." (ECF No. 43 at 4.) Plaintiffs point out that they did reference *Robbin* at the end of their opposition to China AG's motion, in a section addressing China AG's public policy arguments. (*See* ECF No. 35 at 19:19-20:17.)

However, read in context, the Court's statement highlighted the fact that Plaintiffs did not address *Robbin* in analyzing the Ninth Circuit's application of the two seminal Supreme Court cases addressing tolling in the class action context, *American Pipe & Construction Company v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Company v. Parker*, 462 U.S. 345 (1983). Instead, Plaintiffs skipped over that case, which the Court found to be on point, and cited to the Ninth Circuit's later decision in *Catholic Social Services v. I.N.S.*, 232 F.3d 1139 (9th Cir. 2000). (*See* ECF No. 35 at 12:1215:10.) Further, Plaintiffs' attempt to distinguish *Robbin* near the end of their opposition was part of an argument that the Court

considered and rejected - that Plaintiffs were not attempting to relitigate earlier denials of class certification. (*See id.* at 20:5-17; ECF No. 43 at 5-6.)

Therefore, Plaintiffs have not shown that the Court failed to consider a material fact, and the Court's statement regarding Plaintiffs' opposition is not a basis for altering or amending the judgment.

D. *Natan v. Citimortgage, Inc.*

Finally, Plaintiffs argue that *Natan v. Citimortgage, Inc.*, CV 14-5779 DSF, 2014 U.S. Dist. LEXIS 143280 (C.D. Cal. Oct. 1, 2014), supports their argument that the statute of limitations was tolled as to their class action claims. However, *Natan* was issued five (5) days before Plaintiffs filed their oppositions on October 6, 2014, and thus does not qualify as "a material difference in . . . law that in the exercise of reasonable diligence could not have been known" to Plaintiffs, or "a change of law occurring after" the Court's decision. *See* C.D. Cal. L.R. 7-18(a), (b).

Additionally, *Natan* addressed the circumstances in which an *individual claim* should be tolled due to the pendency of a class action. It did not address the tolling of subsequent class action claims. *Natan*, 2014 U.S. Dist. LEXIS 143280, at *2-4. Therefore, *Natan* does not support Plaintiffs' argument, and certainly does not warrant altering or amending the judgment.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs' Motion.

IT IS SO ORDERED.

APPENDIX D - COURT OF APPEALS DENIAL OF REHEARING

FILED

JUL 03 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL H. RESH, On Behalf of Himself and All Others Similarly Situated; WILLIAM SCHOENKE; HEROCA HOLDING, B.V.; NINELLA BEHEER, B.V., Plaintiffs-Appellants, v. CHINA AGRITECH, INC.; YU CHANG, Company,'s CEO, President, Secretary and , Chairman of the Board; YAU-SING TANG, AKA Gareth Tang, Company's Chief Financial Officer; GENE MICHAEL BEN-	No. 15-55432 D.C. No. 2:14-cv-05083-RGK-PJW Central District of California, Los Angeles ORDER

NETT, Director of CAGC; XIAO RONG TENG, Director of CAGC; MING FANG ZHU; LUN ZHANG DAI, Director of CAGC; CHARLES LAW, AKA Charles C. Law, AKA Charles Chien-Lee Law, AKA Charles Chien-Lee Loh, AKA Chien-Lee C. Loh, Director of CAGC; ZHENG WANG, Director of CAGC,

Defendants-Appellees.

Before: REINHARDT, W. FLETCHER, and PAEZ, Circuit Judges.

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc, filed June 7, 2017.

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.